Supreme Court, U.S.
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No. 91-1642

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

BENJAMIN FRANKLIN LOWERY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether this Court should provide guidance for interpreting Federal Sentencing Guideline §2D1.4(a), Application Note 1, because the Federal Circuit Courts inconsistently construe "negotiation" as used in Application Note 1, resulting in improperly enhanced criminal sentences in some Federal Circuits and inconsistent sentencing results which contravene the intent of the Federal Sentencing Guidelines.

2. Whether the trial court clearly erred in sentencing Benjamin Franklin Lowery on the basis of 200 pounds of marijuana where the preponderance of the evidence shows that Mr. Lowery negotiated to buy only 100 pounds, intended to buy only 100 pounds and was not reasonably capable of producing the purchase price for more than 100 pounds.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
TABLE OF AUTHORITIES	iii
REFERENCE TO REPORTS OF OPINIONS	1
STATEMENT OF JURISDICTION	2
STATUTES AND SENTENCING GUIDELINES INVOLVED IN THE CASE	2
STATEMENT OF THE CASE	5
ARGUMENT	11
APPENDIX	1a

TABLE OF AUTHORITIES

CASES:	Page
United States v. Adames, 901 F.2d 11 (2d Cir. 1990)	14
United States v. Bradley, 917 F.2d 601 (1st Cir. 1990)	15,16
United States v. Foley, 906 F.2d 1261 (8th Cir. 1990)	11,12,13,15,16
United States v. Moon, 926 F.2d 204 (2nd Cir. 1991)	15,16,18
United States v. Rodriguez, 896 F.2d 1031 (6th Cir. 1990)	15
United States v. Ross, 905 F.2d 1050 (7th Cir. 1990), *cert. denied*, ___ U.S. ___, 111 S.Ct. 172, 112 L.Ed.2d 136 (1990)	20
United States v. Ruiz, 932 F.2d 1174 (7th Cir. 1991)	14,15,16,18
STATUTES AND SENTENCING GUIDELINES:	
21 U.S.C. §§841(a)(1) and (b)(1)(D)	2,5,6
18 U.S.C. §924(c)(1)	5
18 U.S.C. §3742(e)	3
28 U.S.C. 1254(1)	2,7
Federal Sentencing Guideline §2D.1(c)(12)	6
Federal Sentencing Guideline §2D1.4(a), Application Note	4,7,11,14,15,16,17,18,20,22,23

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REFERENCE TO REPORTS OF OPINIONS

On January 14, 1992, in an unpublished opinion of Case No. 90-5104, the United States Court of Appeals for the Fourth Circuit affirmed the sentence of Benjamin Franklin Lowery on appeal from the United States District Court for the Middle District of North Carolina, Rockingham Division, Case No. CR-90-142-R. *United States v. Lowery*, 953 F.2d 640 (Table) (4th Cir. 1992). The text of this decision is available on Westlaw.

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[1] The parties appearing in the case caption constitute all of the parties to the proceeding in the court whose judgment is sought to be reviewed.

STATEMENT OF JURISDICTION

The Fourth Circuit decided this case on January 14, 1992, issued a mandate that judgment would take effect on February 4, 1992, and amended its unpublished opinion to correct a grammatical error on February 12, 1992. Mr. Lowery has sought neither rehearing nor an extension of time within which to file this petition. The statutory provision which Mr. Lowery believes confers jurisdiction on the Supreme Court of the United States is 28 U.S.C. 1254(1).

STATUTES AND SENTENCING GUIDELINES INVOLVED IN THE CASE

STATUTES

21 U.S.C. § 841. Prohibited acts A

Unlawful acts

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(b) Penalties

Except as otherwise provided in section 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(D) In the case of less than 50 kilograms of marihuana, except in the case of 50 or more marihuana plants regardless of weight, 10 kilograms of hashish, or one kilogram of hashish oil or in the case of any

controlled substance in schedule III, such person shall, except as provided in paragraphs (4) and (5) of this subsection, be sentenced to a term of imprisonment of not more than 5 years, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $250,000 if the defendant is an individual or $1,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $500,000 if the defendant is an individual or $2,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 4 years in addition to such term of imprisonment.

18 U.S.C. § 3742. Review of a sentence

(e) Consideration.—Upon review of the record, the court of appeals shall determine whether the sentence—

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines;

(3) is outside the applicable guideline range, and is unreasonable, having regard for—

(A) the factors to be considered in imposing a sentence, as set forth in chapter 227 of this title; and

(B) the reasons for the imposition of the particular sentence, as stated by the district court pursuant to the provisions of section 3553(c); or

(4) was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable.

The court of appeals shall give due regard to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the findings of fact of the district court unless they are clearly erroneous and shall give due deference to the district court's application of the guidelines to the facts.

SENTENCING GUIDELINES

§ 2D1.4.Attempts and Conspiracies

(a) Base Offense Level: If a defendant is convicted of a conspiracy or an attempt to commit any offense involving a controlled substance, the offense level shall be the same as if the object of the conspiracy or attempt had been completed.

Commentary

Statutory Provisions: 21 U.S.C. §§ 846, 963. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

1. If the defendant is convicted of a conspiracy that includes transactions in controlled substances in addition to those that are the subject of substantive counts of conviction, each conspiracy transaction shall be included with those of the substantive counts of conviction to determine scale. If the defendant is convicted of an offense involving negotiation to traffic in a controlled substance, the weight under negotiation in an uncompleted distribution shall be used to calculate the applicable amount. However, where the court finds that the defendant did not intend to produce and was not reasonably capable of producing the negotiated amount, the court shall exclude from the guideline calculations the amount that it finds the defendant did not intend to produce and was not reasonably capable of producing. If the defendant is convicted of conspiracy, see Application Note 1 to § 1B1.3 (Relevant Conduct).

STATEMENT OF THE CASE

Introduction

A Middle District of North Carolina Grand Jury returned a two count Bill of Indictment against Benjamin Franklin Lowery on May 29, 1990. Count I charged that Mr. Lowery violated 21 U.S.C. §§841(a)(1) and (b)(1)(D) by attempting to possess, with intent to distribute, less than 50 kilograms of marijuana. Count II charged that Mr. Lowery violated 18 U.S.C. §924(c)(1) by carrying and using a firearm during the activity complained of in Count I.

At trial, on August 22, 1990, a jury convicted Mr. Lowery of Count I, the attempt charge, and acquitted

him of Count II, the firearms charge. Conviction of Count I subjected Mr. Lowery to the maximum imprisonment permitted by 21 U.S.C. §§841(a)(1) and (b)(1)(D) of 60 months and to a range of imprisonment of 33 to 41 months under the Federal Sentencing Guidelines. Guideline §2D1.1(c)(12). The court sentenced Mr. Lowery on October 25, 1990, to a term of imprisonment of 60 months, 5 years of supervised release following imprisonment, a fine of $12,500.00 and special assessments of $50.00.

The court established the basic offense level under the Federal Sentencing Guidelines at 24, the level applicable to a charge of attempt to possess 200 pounds of marijuana, despite the fact that Mr. Lowery was only charged and convicted of an attempt to possess 100 pounds. In establishing this basic offense level, the court adopted "the factual findings and guideline applications" found in the presentence report and on that basis found that Mr. Lowery negotiated to purchase 200 pounds. The court increased the basic offense level by two, to 26, finding that Mr. Lowery possessed a firearm during his attempt to purchase the marijuana even though Mr. Lowery had been acquitted of this charge at trial. An offense level of 26, with the applicable criminal history category of I, provides an imprisonment range under the guidelines of 63 to 78 months. Under 21 U.S.C. §841(b)(l)(D), however, the maximum allowable sentence is 60 months. The court sentenced Mr. Lowery to this maximum allowable term of imprisonment.

Mr. Lowery began serving his sentence immediately on October 25, 1990, and is presently incarcerated at the Federal Correctional Institution located at Butner, North Carolina. Mr. Lowery filed his Notice of Appeal

to the United States Court of Appeals for the Fourth Circuit on November 2, 1990. The Fourth Circuit affirmed Mr. Lowery's sentence on January 14, 1992. Mr. Lowery now petitions this Court for certiorari review pursuant to 28 U.S.C. 1254(1).

Statement of Facts

Jose Delgado, a paid government informant, and the only person who discussed a sale of marijuana with Mr. Lowery, testified that he became acquainted with Mr. Lowery in March, 1990. According to Delgado, Mr. Lowery remarked in March, 1990 that he would like to "get hold of a couple hundred pounds" of marijuana. Delgado reported this information to North Carolina SBI Agent Phillip Sweatt, saying that Mr. Lowery tried to get Delgado to help him buy 200 pounds of marijuana. Agent Sweatt testified that Delgado did approach him indicating that [Mr. Lowery] wanted to purchase 200 pounds of marijuana at a purchase price of $700.00 per pound. Agent Sweatt then arranged to place a tape recorder on Delgado to record the conversations between Delgado and Mr. Lowery and, according to Sweatt, in order to determine the quantity and the price of the marijuana.

The presentence report states that it is at a May 10, 1990 meeting that Mr. Lowery negotiated to purchase 200 pounds of marijuana. The presentence report characterized this May 10 discussion as a negotiation to traffic in an uncompleted distribution of 200 pounds of marijuana and stated that the discussion was tape recorded. Delgadao, however, did not testify at trial to a May 10 meeting and no tape or transcript of a May 10 meeting was tendered at trial. Applying Sentencing Guideline §2D1.4(a), Ap-

plication Note 1, the report recommended a basic offense level of 24.

The first meeting about which either Delgado or Agent Sweatt testified, and of which a surveillance tape was tendered into evidence, however, was a meeting between Delgado and Mr. Lowery on May 13, 1990. Delgado testified at trial that in the May 13, 1990 meeting, Mr. Lowery said he would have to go down from 200 to 100 pounds because he did not have enough money for 200 pounds. The transcript of this conversation entered into evidence at trial, however, does not contain any discussion of 200 pounds. The transcript contains statements concerning only 100 pounds and that Mr. Lowery may not even have the money for 100 pounds. The transcript also shows Mr. Lowery telling Delgado not to bring the 100 pounds until Mr. Lowery had the money for 100 pounds. Specifically, the transcript shows Mr. Lowery stating that the best thing to do was just wait until he had his money, then let the seller come. Delgado responded to these comments by stating that the seller could give Mr. Lowery 100 pounds for sixty or seventy thousand dollars. Mr. Lowery replied that Delgado should get the seller to bring 100 pounds and that he would have the money for 100 pounds.

Delgado next met with Mr. Lowery on May 15, 1990. Agent Sweatt had again placed a tape recorder on Delgado for this meeting. Delgado testified at trial that the meeting on May 15 was "something just like Sunday the 13th" and that he and Mr. Lowery discussed when the people were coming with the marijuana. The transcript of the May 15 meeting, introduced into evidence at trial, reveals that Mr. Lowery had nearly assembled the purchase price for

100 pounds. He again told Delgado that he had only enough cash for 100 pounds, and only wanted 100 pounds on a cash deal basis. In fact, Mr. Lowery stated to Delgado that he would not meet with the seller if the seller had more than 100 pounds in his possession. In response, Delgado agreed to Mr. Lowery's terms and repeatedly stated that the seller would conclude a transaction only on a full cash payment basis, and that the seller insisted that Delgado see the money first and make sure it was all there.

The next morning, May 16, 1990, Delgado called Mr. Lowery and told him that the seller was in town. Mr. Lowery picked up Delgado and showed him the money, explaining that he did not have the full $70,000.00 agreed to because he could not put together that much money. On the afternoon of May 16, 1990, Delgado met Mr. Lowery again, this time accompanied by the purported seller, undercover Lieutenant Sheriff Tony Keller. Delgado did not witness the afternoon meeting, other than to introduce Lieutenant Keller to Mr. Lowery. Lieutenant Keller was wearing a tape recorder during this meeting with Mr. Lowery and a transcript of the surveillance tape was admitted into evidence at trial. Lieutenant Keller testified that on May 16, 1990, he was introduced to Mr. Lowery and that he got into Mr. Lowery's vehicle for the purpose of counting the money. The money totalled $62.900.00, $7,100.00 short of the $70,000.00 agreed-upon price for the 100 pounds of marijuana. As Lieutenant Keller counted the money, other officers approached and arrested Mr. Lowery.

As indicated by the presentence report, Mr. Lowery is a 44 year old Native American Indian, married for over 26 years, and the father of three grown children.

Prior to incarceration for his conviction in this action, Mr. Lowery was a self-employed small businessman operating Lowery's Grocery, which he purchased just prior to his arrest for this crime. Mr. Lowery stated to his probation officer that he was motivated to attempt to purchase the 100 pounds of marijuana in order to derive money to help pay the debt he incurred to purchase his grocery business. Further, Mr. Lowery told the probation officer that most of the money gathered to attempt to purchase the 100 pounds of marijuana came from selling off inventory of the recently-purchased store.

As to Mr. Lowery's ability to pay fines and/or restitution, the financial statement included in the presentence report showed Mr. Lowery's net worth to be approximately $53,000, comprised of equity in his home and business, less the balance due on revolving credit accounts. This net worth computation fails, however, to consider that Mr. Lowery owed approximately $38,000.00 on the purchase of his business, thereby reducing his real net worth to $15,000.00. The report also shows that Mr. Lowery had a negative monthly cash flow. The presentence report concluded that Mr. Lowery could afford to pay a modest fine at sentencing and recommended the minimum fine indicated under the guidelines.

ARGUMENT

I. THIS COURT SHOULD PROVIDE GUIDANCE FOR INTERPRETING FEDERAL SENTENCING GUIDELINE §2D1.4(a), APPLICATION NOTE 1 BECAUSE THE FEDERAL CIRCUIT COURTS INCONSISTENTLY CONSTRUE "NEGOTIATION" AS USED IN APPLICATION NOTE 1, RESULTING IN IMPROPERLY ENHANCED CRIMINAL SENTENCES IN SOME FEDERAL CIRCUITS AND INCONSISTENT SENTENCING RESULTS WHICH CONTRAVENE THE INTENT OF THE FEDERAL SENTENCING GUIDELINES.

Although Mr. Lowery was charged and convicted of an attempt to purchase only 100 pounds of marijuana, the court sentenced him on the basis of 200 pounds pursuant to Federal Sentencing Guideline §2D1.4(a), Application Note 1, which provides in part:

> If the defendant is convicted of an offense involving negotiation to traffic in a controlled substance, the weight under negotiation in an uncompleted distribution shall be used to calculate the applicable amount.

Accordingly, to sentence Mr. Lowery on the basis of 200 pounds, the Court must find, by a preponderance of the evidence, that Mr. Lowery had negotiated to purchase an additional 100 pounds which was not yet distributed.

1. "Negotiation" is being inconsistently interpreted by the Circuit Courts.

In *United States v. Foley*, 906 F.2d 1261 (8th Cir. 1990), an undercover agent engaged in a series of drug purchases from the defendant. During a transaction, the agent asked if he could pick up two ounces of cocaine the next time, instead of just one as he

had done in the previous purchases and also asked if the price would be cheaper if he bought two ounces instead of one, to which the defendant replied, "No, it would be the same price". *Id.* at 1262. The trial court, in sentencing the defendant, found that this discussion constituted a negotiation for trafficking two ounces, and adjusted upward the defendant's base offense level. The circuit court held that the trial court committed *clear error* in finding this discussion to constitute negotiation for sentencing purposes. *Id.* at 1264 - 1265. The circuit court held that the discussion was simply an inquiry about the cost of two ounces and that neither party was contemplating another sale at that time. The agent had not offered to buy and the defendant had not offered to sell. *Id.* In short, the parties had not agreed to another sale of two ounces of cocaine.

Whatever inquiry about 200 pounds of marijuana the trial court found Mr. Lowery to have made prior to May 13, 1990 must be viewed in the same light as the *Foley* court viewed its facts. The only evidence tending to show that Mr. Lowery wanted to buy 200 pounds is Delgado's trial testimony that Mr. Lowery said he wanted 200 pounds during a meeting with Delgado sometime prior to May 13. This testimony, however, is inconsistent with every secretly recorded statement by Mr. Lowery throughout his discussions with Delgado. There is simply no mention at all of any prior agreement to purchase 200 pounds or any other amount of marijuana. On May 13, Mr. Lowery said he could purchase only 100 pounds or less because of lack of funds. Delgado's testimony is also inconsistent with Agent Sweatt's direction to Delgado to meet with Mr. Lowery on May 13 and agree to a

price and weight. If Mr. Lowery had already negotiated for 200 pounds at $700.00 per pound, there was no reason for Agent Sweatt to instruct Delgado to meet with Mr. Lowery to agree to a price and weight.

To the extent that the sentencing court relied on the government's understanding and interpretation of the discussions between Mr. Lowery and Delgado, and not upon Mr. Lowery's stated intention to buy only 100 pounds, the concerns of the *Foley* court are concerns here as well:

> We have grave concerns that, in a case such as this, where the government conducts an undercover operation and (during the sale after which it knows an arrest will be made) makes a suggestion to the defendant about future sales, an intolerable avenue for abuse will be opened. While a defendant may be sentenced on the basis of uncharged conduct, that conduct must be his own . . . not the government's conduct. We should not countenance allowing the government to manufacture conduct or negotiation without some evidence of knowing participation by the defendant in the conduct or negotiation.

906 F.2d at 1265.

Mr. Lowery's acts and intentions in dealing with Delgado must govern his sentencing. If Mr. Lowery agreed to buy an additional weight of marijuana, he could be sentenced for the higher weight. However, the strong preponderance of the evidence shows that Mr. Lowery did not negotiate for, or agree to, any greater weight. Rather, he focused upon concluding

the 100 pound transaction which he thought he could afford. It is critically important to disregard impression and speculation and to sentence on the facts. The facts are that the government negotiated a deal with Mr. Lowery for 100 pounds.

The sentencing court decided to enhance Mr. Lowery's base offense level for negotiating 200 pounds on the basis of Delgado's assertions at trial. However, as discussed above, Delgado's trial testimony is refuted by the other evidence and is not supported by the transcripts as the presentence report and the sentencing court had assumed. No statements made by Mr. Lowery constitute negotiation for an identifiable weight in an uncompleted distribution sufficient to enhance Mr. Lowery's sentence. Negotiation is "the act of arranging the terms and conditions of *a sale*". *United States v. Adames*, 901 F.2d 11, 12 (2d Cir. 1990). Nothing expressed by Mr. Lowery in this case can be reasonably construed as negotiation for anything other than 100 pounds of marijuana on a cash basis. Consequently, sentence enhancement on this basis is inappropriate.

In *United States v. Ruiz*, 932 F.2d 1174, 1184 (7th Cir. 1991), the statement by the defendant that he could obtain "even ten more" kilograms of cocaine was determined insufficient to support the sentencing courts' enhancement of the defendant's sentence for the weight of ten kilograms. An offhand statement referring to a larger quantity of narcotics that amounts to no more than braggadocio is insufficient to establish that those quantities were "under negotiation" as envisioned in Guideline §2D1.4(a). *Id.* Otherwise, as the *Ruiz* court so aptly pointed out, "I can get you tons more" or "I can get you all the cocaine

in Colombia" could be sufficient to enhance sentences—a result that could not have been intended under the Guidelines. *Id.* Other circuit courts have similarly held. For example, in *United States v. Moon*, 926 F.2d 204 (2d Cir. 1991), conversations early in the negotiations concerning the availability and price of "one or two" kilograms were not sufficient to sustain a sentence enhancement based on two kilograms where the total amount the defendant actually sought and purchased was only one kilogram. *See also United States v. Foley*, 906 F.2d 1261 (8th Cir. 1990), discussed above.

Yet the Fourth Circuit and others would have the Guidelines interpreted in the Draconian fashion applied to Mr. Lowery. *See e.g., United States v. Bradley*, 917 F.2d 601 (1st Cir. 1990) where a defendant's exaggerated word that he could produce a certain amount of drugs or purchase money, in the absence of direct evidence to the contrary, was sufficient to support an enhanced sentence. Similar to *Bradley*, Mr. Lowery braggingly stated he could obtain great sums of money and sell great quantities of marijuana in short order. On the contrary, however, ample evidence exists contravening these bragging statements. At least one court has recognized that bragging by a defendant does not amount to negotiation and will not support enhancement of a sentence. *United States v. Rodriguez*, 896 F.2d 1031, 1034 (6th Cir. 1990). Regardless, the fact remains that the circuit courts differ greatly as to what constitutes "negotiation." The *Ruiz* court's reasoning distinguished its case from other cases which supported enhanced sentences such as where: 1) a defendant "actually arranged the details of a drug sale (e.g., price, quantity, location),"

but was arrested before consummating the deal; or 2) the deal fell through because the buyer found a better price. *Id.* The better-reasoned approach is found in the *Ruiz*, *Foley* and *Moon* line of authority. Mr. Lowery is entitled to this Court's guidance to the courts below to follow such an approach.

2. Guidance is needed for the uniform application of Guideline §2D1.4(a).

Sentencing Guideline §2D1.4(a), Application Note 1 punishes a defendant's actual *negotiation* to traffic in drugs, not his general interest in doing so before he takes illegal steps toward consummating a transaction for an identifiable weight of drugs. It is extremely difficult, in "attempt" cases, to draw a line in the progression of thought and actions resulting in criminal attempt activity, and to decide when punishable behavior begins. (cf., e.g., *Ruiz* and *Bradley*, *supra*). The difficulty in making this determination, as revealed by the reported cases, underscores the importance of establishing principles for the guidance of the courts and the prosecution and defense bars in application of this sentencing guideline.

Moreover, the limited procedural safeguards and notice afforded defendants under the Federal Sentencing Guidelines mandates a clearer standard for the application of Guideline §2D1.4(a) than that followed by the Fourth Circuit. Sentencing courts are not limited to consideration of the weight of drugs for which a defendant is arrested and charged where the transaction is part of a negotiated deal to purchase a larger, but not-yet-distributed weight of drugs. Defendants may be charged with a low weight, but sentenced in accordance with a high weight. Such defendants receive no notice, however, that they are

in jeopardy of being sentenced with a high weight until the evidence is in, the trial is over, and a judgment of conviction is returned.

With a conviction in hand, the government may seek a dramatic enhancement of a defendant's imprisonment on the basis of factors raised on short notice and shown by a mere preponderance of the evidence. The preponderance of the evidence may be influenced by information that does not rise to the dignity of evidence permitted by Federal Rules of Evidence. That this should be so has already been determined by Congress and we do not question it here. However, the *application* of the Guidelines must lend itself to consistency and fairness in order to ensure that the ends of justice are met.

Justice mandates close vigilance of the application of the Federal Sentencing Guidelines to assure the defendant's sole remaining procedural protection—proof of sentencing factors by a preponderance of the evidence. The risk is great that the preponderance of evidence on sentencing factors may be tipped against the defendant on the basis of impressions and observations as opposed to facts proven in accordance with evidentiary law. Mr. Lowery's case dramatically illustrates that defendants, after a trial on an amount they attempted to buy, risk being sentenced on a weight they never attempted to buy, had no intention to buy and were incapable of buying. This Court should provide guidance for applying Sentencing Guideline §2D1.4(a), Application Note 1, by clearly delineating a test for establishing what constitutes negotiation and the ability to consummate a transaction thereunder. This guidance will assist the courts, prosecutors and defense counsel with case adminis-

tration, preparation and conduct. Clear guidance will enable defendants to receive informed pretrial advice on the true risks of trial and sentencing, will assist the prosecution in efficiently and effectively preparing cases and will result in more consistent and fair sentencing by the courts.

This Court should adopt a test similar to that required by the *Ruiz* and *Moon* courts. Negotiation should be defined to include, *at a minimum*, specific proof by a preponderance of the evidence of discussion of such details as price, quantity, description, delivery location and other terms or conditions of sale. This Court should also require proof by a preponderance of the evidence of specific factors setting forth a defendant's ability to consummate a transaction under Guideline §2D1.4(a), Application Note 1. These factors should balance debt against assets, as well as cash income against cost outflow, to arrive at the overall ability of the defendant to do what he said he could do.

II. THE TRIAL COURT CLEARLY ERRED IN SENTENCING BENJAMIN FRANKLIN LOWERY ON THE BASIS OF 200 POUNDS OF MARIJUANA WHERE THE PREPONDERANCE OF THE EVIDENCE SHOWS THAT MR. LOWERY NEGOTIATED TO BUY ONLY 100 POUNDS, INTENDED TO BUY ONLY 100 POUNDS AND WAS NOT REASONABLY CAPABLE OF PRODUCING THE PURCHASE PRICE FOR MORE THAN 100 POUNDS.

The facts before the sentencing court do not support either that Mr. Lowery negotiated for or that he was reasonably capable of procuring 200 pounds and the court clearly erred in so finding.

1. Mr. Lowery did not negotiate to purchase 200 pounds of marijuana.

After a fleeting reference by Delgado, the paid government informant, that Mr. Lowery wanted to buy 200 pounds of marijuana at $700.00 per pound, the remaining negotiations of price, weight and other terms of sale indicate only 100 pounds. The transcript of the May 13 meeting between Mr. Lowery and Delgado makes no mention of any prior agreement to purchase 200 pounds of marijuana. In fact, no mention is made of any prior negotiation to buy any marijuana at all, contrary to Delgado's trial testimony. In the transcript, Mr. Lowery plainly states that he wants only 100 pounds, is afraid he does not have enough money for even 100 pounds, and that he is not interested in any deal until he can scrape together money for 100 pounds. Therefore, Mr. Lowery's clearly stated intentions, once negotiations began on May 13, was that he only wanted 100 pounds and that he did not want to conclude the deal until he had the purchase price in hand.

Mr. Lowery's intention to buy only 100 pounds, and his inability to purchase more than 100 pounds, remained unchanged up to and including the attempted buy on May 16, 1990. Delgado testified that his meeting with Mr. Lowery on May 15, 1990 was "just like [the meeting on] Sunday the 13th". The transcript of the surveillance tape of the May 15 meeting shows that Mr. Lowery informed Delgado that he had just about assembled the purchase price for 100 pounds, that he would have the money for 100 pounds, and that he was interested only in a deal for 100 pounds on a cash basis. In fact, the transcript shows Mr. Lowery telling Delgado that he would not even meet

with the seller if the seller had more than 100 pounds in his possession. If the seller had more, the seller would have to unload the extra weight before meeting Mr. Lowery. Delgado agreed to these terms, stating that the sellers, because they did not know or trust Mr. Lowery, would conduct the transaction only on the cash basis outlined by Mr. Lowery. Further, the sellers insisted that Delgado see the purchase money before the sellers would even meet with Mr. Lowery.

2. Lowery was not reasonably capable of producing the purchase price for 200 pounds of marijuana.

Even assuming arguendo that Mr. Lowery had negotiated for 200 pounds, the sentencing court still clearly erred in sentencing based on 200 pounds because Mr. Lowery was not reasonably capable of producing the money to buy 200 pounds. Sentencing Guideline §2D1.4(a) Application Note 1, states:

> However, where the court finds that the defendant did not intend to produce and was not reasonably capable of producing the negotiated amount, the court shall exclude from the guideline calculation the amount that it finds the defendant did not intend to produce and was not reasonably capable of producing.

The "negotiated amount" in a reverse sting such as this (i.e. where the government is the seller) is the purchase money. See *United States v. Ross*, 905 F.2d 1050 (7th Cir. 1990) holding that a defendant did have the capability to produce the purchase price, but, for purposes here, holding that a buyer's capability to produce the price is an appropriate inquiry under Sentencing Guideline §2D1.4(a), Application Note 1.

Mr. Lowery's inability to generate $140,000.00 to buy 200 pounds of marijuana is obvious. Mr. Lowery repeatedly indicated throughout his negotiations with Delgado that he had difficulty even generating the full $70,000.00 for 100 pounds. Most of the money for the 100 pounds came from selling off the inventory that was in place when Mr. Lowery bought his store. The evidence that Mr. Lowery had the capacity to raise $140,000.00 is based solely upon Mr. Lowery's bravado and braggadocio.

The financial summary in Mr. Lowery's presentencing report shows the reality that Mr. Lowery was incapable of producing anywhere near enough money for 200 pounds. The parole officer's examination of Mr. Lowery's financial assets shows that Mr. Lowery lacked even enough cash to pay regular and necessary living expenses, much less make payments on his consumer debt. According to the report, Mr. Lowery's total net worth was approximately $53,000.00 which erroneously did not include $38,000.00 in debt still owed after purchasing the store. Therefore, Mr. Lowery's real net worth was more on the order of $15,000.00. Plainly, Mr. Lowery had no additional cash available for drug purchases.

Moreover, Mr. Lowery's possessions are clearly not reflective of any supplemental income from other drug transactions, and refute his braggadocio. The attributes of Mr. Lowery's material surroundings and possessions simply dispel the government's characterization of Mr. Lowery's ability to consummate a transaction for 200 pounds of marijuana. The strong preponderance of all of the evidence shows that Mr. Lowery could not afford 200, or even 100 pounds of marijuana, and that he managed to come

up with $62,900.00 for this one sale only by exhausting the funds he obtained from the liquidation of existing inventory he had purchased with the store.

In short, the sentencing court clearly erred in its application of the Guidelines by failing to find that Mr. Lowery was not reasonably capable of producing the purchase price for 200 pounds of marijuana. Accordingly, even assuming arguendo that the court properly found that Mr. Lowery negotiated for 200 pounds, it was compelled under Sentencing Guideline §2D1.4(a), Application Note 1, to disregard any of that weight which he was incapable of purchasing. The guidance which Mr. Lowery seeks from the Court here would compel the Circuit Court, and thus the sentencing court, to conclude that he was unable to consummate the transaction for which he was sentenced.

CONCLUSION AND RELIEF REQUESTED

For the reasons stated in this petition and to be presented in brief and at oral argument, the sentencing court clearly erred in finding that Benjamin Lowery negotiated for 200 pounds of marijuana and in sentencing Mr. Lowery on the basis of 200 pounds. Further, the court clearly erred in failing to find that Mr. Lowery was not reasonably capable of producing the purchase price for 200 pounds. Accordingly, Mr. Lowery's case must be remanded for resentencing with instructions to resentence on the basis of 100 pounds. Appellant requests that this Court grant this Petition for Writ of Certiorari in order to remand Mr. Lowery's case for resentencing on the basis of the guidance this Court provides for the application

of Federal Sentencing Guideline §2D1.4(a), Application Note 1.

Respectfully submitted,

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APPENDIX

APPENDIX

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 90-5104

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

BENJAMIN FRANKLIN LOWERY,
Defendant-Appellant.

Appeal from the United States District Court for the Middle District of North Carolina, at Rockingham, Hiram H. Ward, Senior District Judge. (CR-90-142-R)

Submitted: October 16, 1991

Decided: January 14, 1992

Before WIDENER and WILKINSON, Circuit Judges, and BUTZNER, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

COUNSEL

Steven D. Hedges, PATTON, BOGGS & BLOW, Greensboro, North Carolina, for Appellant. Robert H. Edmunds, Jr., United States Attorney, Michael F. Joseph, Assistant United States Attorney, Greensboro, North Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

OPINION

PER CURIAM:

Benjamin Franklin Lowery was convicted of attempting to possess less than fifty kilograms of marijuana with intent to distribute (21 U.S.C. §846 (1988) and 21 U.S.C.A. §841 (West 1981 & Supp. 1991). He appeals the sentence imposed and we affirm.

Lowery told a customer of his rural grocery store that he wanted to buy about two hundred pounds of marijuana and asked if the customer knew of a source. The customer contacted law enforcement authorities and then, acting as a confidential informant, told Lowery that his nephew could supply the marijuana. Eventually, Lowery decided he could only afford to buy one hundred pounds in the first transaction; however, in two recorded conversations with the informant Lowery said that if more were given to him he could quickly sell it, and made it evident that he was eager to arrange future purchases so as to have a regular supply. Lowery told the informant that he would take two or three hundred pounds the next time, and would make one of his buildings ready as a place to unload the marijuana.

The sentencing court found that Lowery had negotiated for at least two hundred pounds of marijuana and determined his base offense level using this amount. On appeal, Lowery maintains that he had contracted to buy only one hundred pounds and that no more should have been considered in fixing his sentence.

A district court's findings as to the amount of drugs involved in a offense is a factual matter and will not be disturbed unless it is clearly in error. United States v. Daughtrey, 874 F.2d 213 (4th Cir. 1989). Application note 1 to U.S.S.G. §2D1.4 (Attempts and Conspiracies) provides

that "If the defendant was convicted of an offense involving negotiation to traffic in a controlled substance, the weight under negotiation in an uncompleted distribution shall be used to calculate the applicable amount." The information before the sentencing court showed that Lowery was attempting to arrange a regular source of supply of marijuana and that he had made clear his intention to buy far more than the one hundred pounds he contracted for in this transaction, which was intended to be the first of many. We find no clear error in the district court's determination of the amount involved in the offense.

The judgement of the district court is therefore affirmed. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the Court and argument would not aid the decisional process.

AFFIRMED